Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	MB Docket 04-261
Violent Television Programming	)	
And Its Impact on Children	)	

TO: The Commission

INTRODUCTION

This comment is in response to the July 8, 2004, Federal Communications Commission's *Notice of Inquiry* ("Notice") seeking comment on a variety of issues concerning presentation of violent programming on broadcast television and its impact on children, including how violent programming could be defined for regulatory purposes, and the constitutional and statutory limitations on the Commission's and Congress' authority to regulate this programming on broadcast and cable. The Commission also inquired whether the V-Chip and television programming ratings system were accomplishing their intended purpose, or whether a more direct regulatory mechanism should be imposed.

Like many Americans, I am concerned about the questions of whether violence on television has an impact on children and understand the need to protect our children. However, I believe that censorship should always be a last resort, not the first. Any attempt by the Commission to establish a safe harbor (restriction on airing time) or similar restrictions on television programming will create a chilling effect on speech without solving the violence problem in our society, because the causes and consequences of violence are extraordinarily multifaceted and complex. There are also no constitutional, statutory, nor public policy grounds under which the Commission or Congress would have the

authority to place such restrictions on television programming, even violent television programming, as discussed below.

1. No Provision of the *1934 Communications Act* or the *1996 Telecommunications Act* authorizes the FCC to restrict violent programming on television.

The *Communications Act of 1934 ("Act")* forbids the FCC from engaging in "censorship" or from promulgating any "regulation" that "interfere[s] with the right of free speech by means of radio communication." 47 U.S.C. §326. On its face, section 326 precludes the Commission from directly regulating the content of speech on radio and television.[1] Unless the Commission can point to another specific statutory provision authorizing the promulgation of restrictions on violent television programming, which could be argued to override the prohibitions of Section 326, the Commission appears forbidden by the Act from adopting a violence safe harbor or similar regulations.

In addition, section 551 of the *Telecommunications Act of 1996 ("1996 Act")* – which provides for the establishment of a "television rating code," does not suggest that the Commission possesses the power to regulate violent programming directly by adopting a safe harbor or by other means. Section 551 provides that unless distributors of video programming establish "voluntary rules for rating video programming that contains sexual, violent, or other indecent material" and, further agree "voluntarily to broadcast signals that contain ratings of such programming," the FCC is to create an advisory committee, develop such a regime, and impose it upon broadcasters through regulation.[2] Once the television industry adopted the current V-Chip and program rating system, which the Commission did approve, the Commission had fulfilled its statutory role. Section 551 in no way suggests

[1] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 650, 652 (1994)
[2] Section 551(e)

that the Commission has additional authority to regulate television content generally, or violent programming specifically, beyond that granted by the plain language of the statute.

Furthermore, the Supreme Court's emphatically narrow holding in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), should not be relied upon to give authority to the Commission to regulate violence on broadcast television. The Court in *Pacifica* took pains to "emphasize the narrowness of its holding," which was confined to a conclusion that the Commission had the authority to fine a particular broadcast of patently offensive sexual and excretory language. *Id.* at 750. Plain reading of *Pacifica* shows concern with the government's ability to regulate children's access to the type of sexual and excretory speech that, in the Court's view, approached constitutionally proscribed obscenity. The Court noted that "obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards." *Id.* at 745-746. Thus nothing in *Pacifica* or subsequent decisions indicates that the Court intended to open the door to wide-scale regulation of speech – particularly violent expression, which, unlike obscenity, has always been considered to be fully protected by the First Amendment. *Pacifica* should not be interpreted to mean that the FCC has unrestricted authority to regulate any broadcast speech that it deems objectionable.

2. Broadcast stations should no longer be viewed as "public trustees" obligated to serve the public's interest in ways deemed fit by the Commission.

The notion that the Commission has some right to review programming on broadcast stations started early in history. Using the scarcity rationale that is no longer valid (discussed below), the Commission adopted the view that broadcast stations should operate as "public trustees" and that an important function of the Commission would be to ensure that broadcasters perform that role. It meant that the broadcast stations had a

special duty to sacrifice financial gain to the interests of the viewing and listening public.[3] This notion seemed easy to justify in the early days of broadcasting because the use of the public spectrum was given to the broadcast stations free of charge and the spectrum was scarce to the extent that there was interference on the airwaves. In addition, as stated in the *FCC Policy Statement on Comparative Broadcasting Hearings*, 1 FCC 2d 393 (1965), the Commission used a public interest criteria as one of the factors in determining who would be allowed receive the spectrum license, so it only seemed natural that those who won the broadcast licenses would be obligated by the government to use the license to serve the public.[4]

However beginning in the 1970s, the FCC came to hold the view that broadcast stations ought to be governed by market forces[5]. The government pointed out that viewers and listeners should exercise influence over the licensees by using their viewing preferences, rather than petitioning the Commission for relief. The Commission also realized that the licensing hearings were a "very expensive way of accomplishing very little"[6] since the First Amendment greatly limits the Commission's discretion in choosing licensees. This led to the use of modern auctions as the mechanism for initial license assignments and the Commission's statutory authority to conduct hearings under section 309 of the *1934 Communications Act* ceased to exist. Instead of hearings, modern law requires that almost all new licenses be assigned by open auction and sold to the highest bidder, "so the old rationale for public trustee obligations is considerably undermined."[7]

Thus if a license is being auctioned off to the highest bidder with no criteria to serve the public interest, the government should not be able to use the public trustee model to

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[3] Stuart Benjamin, *Telecommunications Law and Policy* at 157.
[4] *See In Re H.E. Studebaker*, 1 FCC 191 (1934).
[5] *Id.* at 158.
[6] *Id.* at 81.
[7] *Id.* at 158.

impose regulation on the licensees anymore. If it is not a criteria set forth in order to receive the license, the government needs better constitutionally sound reasons for regulating violent programming on broadcast television. The broadcasters purchased a right to broadcast on public airwaves without regulation from the government, as long as the speech is constitutionally protected, as violent speech is. The Court in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) grasped the idea perfectly by stating that "Congress intended to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

3. The economic scarcity and technological scarcity rationales do not hold up anymore as to justify regulation of violent programming on broadcast television.

Traditionally, content based regulations of the broadcast media have been justified on two basic grounds: the *scarcity* of the airwaves and the *pervasiveness* of the medium. The U.S. Supreme Court in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974), made clear that the public trustee concept does not apply to newspaper publications in large part because of the First Amendment. The Court clearly suggested that print media were allowed to fulfill their public functions by whatever means they chose in pursuit of their own self interest, subject only to content neutral regulations of general applicability. However, in contrast, the Court reached fully opposite conclusions regarding broadcast stations in *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969) using economic and technological scarcity rationales.

The Court in *Red Lion* distinguished broadcast from cable and print media reasoning that the inherently limited nature of spectrum makes broadcast unique. The Court argued that without government control over broadcast, the medium would be of

little use because no one will be able to hear each other. These points may have made some sense at the time, however they no longer hold true. Scarcity is a thing of the past now. As Justice Edwards argued in his dissent in *Action for Children's Television v. FCC*, it is time to revisit this rationale.[8] First, economists argue that all resources are scarce to some extent and with valuable commodities such as the airwaves; the demand will likely exceed the supply.[9] Second, with the development of cable, satellite, and the internet, we now have an abundance of alternatives, essentially rendering the scarcity argument superfluous. People are no longer limited to just radio or television where interference may be a problem; there is an indefinite amount of broadcasting that can be done over the internet and cable now. Moreover, researchers in wireless technology have begun to demonstrate the "viability of systems that allow many users to share the same slice of spectrum without interfering with one another."[10] When there is no longer spectrum scarcity, it renders the reasoning behind *Red Lion* expendable and when shared spectrum is possible, allocation of the spectrum (whether licensed or auctioned) must go, meaning the government will have no control of the spectrum. Just as the government cannot auction a license to print a newspaper, it may not be able to auction the right broadcast soon.

4. Is broadcast television really any more pervasive than other forms of media?

In an attempt to distinguish broadcast from other media, the plurality in *Pacifica* found that "broadcasting is uniquely accessible to children, even those too young to read."[11] The Court also pointed out that the "material presented over the airwaves confronts the

[8] *Id.* at 234
[9] *Id.*
[10] *Id.* at 41.
[11] *Pacifica* at 749.

citizens, not only in public, but also in the privacy of the home."[12] This argument is clearly flawed and cannot serve as justifications for reduced First Amendment given to broadcast because pervasiveness of its programming hardly distinguishes broadcast from other forms of media. When 85% of Americans subscribe to cable and satellite,[13] one cannot possibly argue that pervasiveness only applies to broadcast television. If fact, the District Court opinion in *Playboy Entertainment Group v. United States* stated that cable television is a means of communication which is pervasive and the Supreme Court has recognized that cable television is as accessible to children as over-the-air broadcasting, if not more so.[14] The intrusiveness rationale, that the material confronts the citizen in the privacy of his or her home, likewise does not distinguish broadcast from cable. One can also argue that a clear distinction between cable and broadcast is that cable is by subscription with better parental controls, but the Court does not argue these facts as the reasoning behind why they feel broadcast is a "unique" medium compared to cable.

What then is the difference between watching violence on broadcast or on the hundreds of channels provided by cable and satellite when the two are equally accessible to most children? There really is not a difference. The fact that "broadcast audiences have no choice but to 'subscribe' to the entire output of traditional broadcasters"[15] has no bearing because cable and satellite are just as available to Americans today. The Courts argument does not sufficiently account for the divergent First Amendment treatments of the two media.

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[12] *Id.* at 748.
[13] Karl Manheim, *Cable TV* PowerPoint Presentation, Slide 2.
[14] *Playboy Entertainment Group v. United States*, 945 F. Supp. 722 (1996).
[15] *Action for Children's Television v. FCC,* 58 F.3d 654 (1995).

5. Any restriction on violent television programming must withstand the strictest constitutional scrutiny.

In *Turner Broadcasting System v. FCC [Tuner II]*, the Court considered full First Amendment protections for cable television when it applied Intermediate Scrutiny to determine whether the content-neutral "must carry" provisions were constitutional. Since we are now left to believe that there is no significant difference between broadcast and cable, the government should apply the same full First Amendment protections to broadcast television as well.

A safe harbor or similar regulation of violent television programming based on its content would be subjected to exacting First Amendment scrutiny.[16] Indeed, such "content-based regulations are presumptively invalid."[17] In fact, the restrictions potentially at issue here present an even more invidious type of content-based speech regulation; viewpoint discrimination. Since the government cannot ban all violence, it would have to categorize particular types of violence and restrict particular presentations of, or attitudes toward violence. This would constitute the most egregious form of viewpoint discrimination. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[18] Because safe harbor of other similar restriction on violent television programming regulates speech on the basis of content (or even viewpoint), it would be subject to the strictest form of constitutional scrutiny.

To justify restricting portrayals of violence on broadcast television under this standard, the government would be required to (1) articulate a compelling state interest; (2) establish that the restriction is necessary to promote that interest; and (3) show that the

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[16] *See Playboy*, 529 U.S. at 812-813.
[17] *R. A. V., Petitioner v. City of St. Paul, Minnesota,* 505 U.S. at 382 (1992).
[18] *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

restriction is narrowly tailored (least restrictive alternative available to serve that interest).[19] The government may be able to argue that it has a compelling interest in protecting the children; however it must do more than assert that the state has a compelling interest in the well being of the minors. The government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way."[20] The Commission would be unable to meet this burden because the existing social science literature does not establish a causal link between watching portrayals of violence on television and real world aggression.[21] Even those who "believe that media violence is a significant influence on youthful attitudes and behaviors do not agree about which violent images or ideas are harmful.[22] There are just too many conflicting studies and views on this matter for the government to conclude a causal link.

In addition, the Commission would have great difficulty arguing that it can narrowly tailor rules that would restrict the airing of violent programming on television. When there is a serious problem with identifying "real world" effects of television violence, and categorizing which specific types of violence is harmful to children, the restriction would not be narrowly tailored. Narrow tailoring requires that the regulation of speech be limited to what is necessary to achieve the government's end, and that the state explains the rejection of less speech-restrictive alternatives.[23] Because less speech-restrictive means are readily available to the public, the government must explain why those mechanisms cannot be used in achieving their goals. The V-Chip provides a self-regulatory system under which the

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[19] *Turner*, 512 U.S. at 664.
[20] *Id.*
[21] *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (2001).
[22] Marjorie Heins, *Violence and the Media* at 4 (First Amendment Center 2001).
[23] *R.A.V.*, 505 U.S. at 395.

television industry voluntarily provides ratings to programming. This gives the parents the power to decide what they want their children to see.

In *Ashcroft v. American Civil Liberties Union*, the Supreme Court in June 2004 struck down the Child Online Protection Act on grounds, among others, that the widespread availability of Internet filtering software permits parents, rather than the government to control the content accessed by their children. Courts agree that when there is a viable means for the parents to censor what their children are exposed to, the government should not step in. According to statistics, fifty-five percent of parents say ratings should be displayed more prominently and a mere twenty-eight percent of parents of young children (2-6 years old) know what the rating TV-Y7 means (directed to children age 7 and older).[24] Only 12% know that the rating FV (fantasy violence) is related to violent content, while 8% think it means "family viewing."[25] Also among parents who have a V-Chip and know it, only 42% have used it.[26] Nearly two-thirds (61%) of parents who have used the V-Chip say the found it "very" useful.[27] Given these statistics, there is so much more the government can do in terms of educating consumers on the ratings system and the use of the V-Chip. In addition, under section 551 the Commission has specific authority to establish a ratings system to be used with the V-Chip for indecent and violent programming. The Commission does not have the authority to directly regulate content of violent programming.

Though I do not have children myself, until I started doing research for this comment letter, I had very little knowledge about the V-Chip and did not know that most television sets already came with the V-Chip in place. I believe this goes to show the

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[24] Parents Television Council Publications, *Facts/TV Statistics*, http://www.parents.org/ptc/facts/mediafacts.asp.
[25] *Id.*
[26] *Id.*
[27] *Id.*

government has utterly failed to publicize the V-Chip and educate consumers of the television ratings system and the V-Chip. Maybe if more consumers were aware of the V-Chip already in their television sets, more parents would be inclined to use the V-Chip at their own discretion to protect their children from violence on television. Thus, unless the government comes up with a very good reason why this method would not work in achieving their ends, their restrictions cannot be narrowly construed. Therefore, the government cannot satisfy the Strict Scrutiny test of the Courts.

6. Can a public policy argument help the government restrict violent programming on television?

None of the above constitutional arguments seem to justify content based regulation for violent programming on broadcast television, thus we are left with what may be the government's best argument against showing violence to children on television. It is similar to the argument that was used in the *Children's Television Act* to obligate broadcasters to carry educational programming for children on their stations during certain hours. However, this argument may be at best persuasive because the obligation to carry certain programming is quite different from content-based regulation that does not satisfy strict scrutiny.

As clearly pointed out by the Commission in *Policies and Rules Concerning Children's Television Programming*, the educational programming regulations are viewpoint-neutral conditions on a broadcaster's free use of the public airwaves, and they do not mandate, censor or foreclose speech of any kind.[28] Based on the Commission's conclusions, we see a significant difference. While the *Children's Television Act* is viewpoint-neutral, safe harbor or similar restrictions on violent television programming is

[28] *Policies and Rules Concerning Children's Television Programming*, 11 FCC Rcd. 10660 (1996).

content-based (viewpoint). The Commission also mentioned *Pacifica* to justify imposing educational programming regulations on broadcasters. As we discussed earlier, the arguments under *Pacifica* are flawed because broadcast is no longer "uniquely accessible to children" and no longer the only "pervasive presence in the lives of all Americans." Therefore, not even the public policy arguments for protecting children really seem like strong arguments that would authorize the Commission to regulate restrictions on violent programming on broadcast television.

7. Regulation will be bad policy that will end up driving broadcast television completely out of the competition.

As mentioned by the Court in *Turner II*, there is clear concern over the broadcast industry's ability to compete with cable and satellite. Broadcast is virtually on life support, because of the recent trend in cable and satellite subscriptions. With the internet not far behind in providing just as much competition for television as well, broadcast will not be able to survive. If we were to impose such a content-based regulations on just broadcast television, where would that leave broadcast television? Though the absence of a "must carry" provisions for cable may not have raised concerns over broadcast television disappearing in its entirety,[29] such a concern should be raised with regulation of content on broadcast television. If cable, satellite, and the internet are able to offer "uncensored" programs while broadcast has to follow educational programming and violent programming regulations, people are unlikely to turn to broadcast television. With the significantly higher number of channels, better quality, more diverse programming, and with the already high number of Americans subscribing to cable or satellite, that would leave broadcast no room to compete. Broadcasters will be reluctant to televise certain programs

[29] *Turner*, at 666

(even those that may not be banned) due to fear of censorship and fines. This will eventually lead to self-censorship and create a chilling effect on speech. The quality and number of diverse programs on broadcast will deteriorate to a substantial degree and broadcast may fail altogether.

CONCLUSION

Though there is little doubt that violence in society is a significant concern and a major public policy issue in the United Sates, there is also very little doubt that the Commission has no authority to regulate content-based violent programming on the broadcast television. There is no longer a public trustee or scarcity argument, and the government cannot satisfy the strict scrutiny test because there are other non-government remedies readily available. At the end, regulation will drive the broadcast stations out of business. Is this what we want to do? Though the idea of protecting minors from violence may be beneficial to society, it also hinders our right to free speech under the First Amendment and can drastically affect the broadcast economy. Therefore, in conclusion, I feel that regulation of safe harbor provisions and similar regulations for violent programming on television should not be allowed as mentioned under the *Notice*.